

OSHA's New COVID-19 Guidelines and What They Mean for Employers

On June 10, 2021, OSHA issued updated COVID-19 guidance for all employers, along with its much awaited emergency temporary standard focused on health care workers. Importantly, OSHA continued in the footsteps of the CDC in making clear that non health care employers may safely allow **vaccinated** workers to return to normal workplace conditions — leaving behind masks, social distancing, and other COVID-19 precautions — but unvaccinated workers must continue to follow all of the CDC's recommended precautions. For employers, this bifurcated set of safety guidelines creates a practical problem in enforcement. How does a supervisor know if an employee is required to wear a mask if he or she does not know if the employee is vaccinated? Moreover, this bifurcated approach sets up a dilemma for employers looking to return to “normal,” as it appears likely that OSHA will not recommend the easing of COVID protocols for unvaccinated workers any time soon, meaning that a vaccinated workforce will have a substantial advantage in terms of compliance obligations.

Should Businesses Ask Employees About Their Vaccination Status?

The recent announcements from CDC and OSHA that fully vaccinated persons may resume regular life activities (including working) without wearing masks or distancing has set off a chain reaction of policy changes. In response, businesses have largely adopted three approaches to inquiring about employee vaccination status:

Don't Ask/Don't Tell

These employers have announced that vaccinated employees are relieved from continued COVID protocols, but largely rely on the honor system. Most employers in this category rely on privacy concerns as a basis for not requesting proof of vaccination status, or operate in a state with state law protections (like Montana).

Soft Enforcement

Employers in this category don't actively police COVID compliance for unvaccinated workers, but investigate complaints and require proof of vaccination status if a question arises regarding compliance with company policy.

Strict Enforcement

Some states (for example Oregon) require employers to verify employee vaccination status as a prerequisite to allowing the cessation of COVID precautions in the workplace, like masking. Other employers have voluntarily implemented strict policies requiring employees to provide proof of vaccination in order to discontinue workplace COVID protocols.

Notably, the new OSHA guidelines do not **require** an employer to delve into an employee's vaccination status. An employer may simply require that its employees continue to comply with COVID protocols until they voluntarily provide proof of vaccination.

As a practical matter, however, the OSHA guidelines create a real enforcement problem for large employers who are now expected to maintain two sets of safety rules across their workplaces depending upon employee vaccination status. Continuing a “Don't Ask/Don't Tell” policy in light of the new OSHA guidelines carries a risk that OSHA will decide that more is required. Although the guidelines are not authoritative, our recommendation is for employers to make a good faith effort to ensure that unvaccinated workers are continuing to follow recommended COVID protocols. At minimum, this would include requiring workers to offer some type of proof/attestation of



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vaccination before being relieved of the heightened COVID safety protocols. The EEOC has made clear that such inquiries are lawful, as long as the information is treated as confidential under ADA privacy requirements and only shared with persons who have a business need to know the information.

What Impact Will the OSHA COVID Guidelines Have on Mandatory Vaccination Policies?

Many employers are eager to get back to “normal” in the workplace, with more offices reopening across the country. One takeaway from the updated OSHA COVID guidelines is that, at least for now, fully vaccinated workplaces will have an advantage in lessened compliance obligations. In a mixed workplace, for example, management would presumably need to confirm that employees congregating mask-less in a lunch room or meeting space are all vaccinated, or risk running afoul of the OSHA guidance. This job of enforcement becomes easier in a workplace where all or most workers are vaccinated.

It is also notable that the OSHA guidelines do not have an expiration date. It is not clear how long OSHA will expect employers to enforce mask and distancing requirements for unvaccinated workers, and whether OSHA will follow directives from the CDC or other state and local authorities to the extent these requirements are lifted for the unvaccinated. As conditions hopefully improve, employers will no doubt face mounting pressure to relieve safety protocols, even on unvaccinated workers.

In sum, the recent guidelines from both the CDC and OSHA make clear that employers can only allow vaccinated workers to cease following the long-standing COVID protocols such as masking and distancing. This bifurcated approach to workplace safety is likely to be in place for the foreseeable future, and employers should carefully develop a strategy for gathering information on employee vaccination status, which will be a necessary element of future compliance with OSHA and analogous state and local laws.
